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JOSEPH F. SPANIOL, JR.  
CLERK3  
No. 85-732

IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1985

WESTERN AIR LINES, INC.; REPUBLIC AIRLINES, INC.  
FRONTIER AIRLINES, INC.; AND OZARK AIR LINES, INC.,  
*Appellants,*

v.

BOARD OF EQUALIZATION OF THE STATE OF  
SOUTH DAKOTA, *et al.*,  
*Appellees.*

On Appeal from the Supreme Court  
Of the State of South Dakota

**REPLY BRIEF**

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**REPLY BRIEF**

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Appellees' motion to dismiss this appeal or, in the alternative, to affirm the judgment of the South Dakota Supreme Court gives this Court no reason to grant either form of relief. Instead, the motion starkly reveals the absence of any acceptable rationale for the Supreme Court of South Dakota to have denied interstate air carriers their federal protection from discriminatory state property taxes; and it reem-

phasizes the potential impact of this denial not only on airlines, but also on motor carriers and railroads.

*First*, appellees admit that South Dakota taxes the transportation property of interstate air carriers, even though most other commercial and industrial property is exempt from taxation. Motion 3,8.<sup>1</sup> Appellees also concede that "the Appellant Airlines raised proper challenges in the administrative boards and the Courts of South Dakota. . . ." *Id.* at 5.

*Second*, appellees do not dispute that §7(d) of the Airport Development Acceleration Act, 49 U.S.C. § 1513(d) ("§ 1513"), was intended "to prohibit discriminatory property taxes imposed on air carriers." *Aloha Airlines, Inc. v. Director of Taxation*, 464 U.S. 7, 10 n. 13 (1983). Instead, appellees concede that § 1513(d) is one of three statutes, "identical to a point," "prohibiting discrimination against interstate commerce. . . ." Motion 4, 5. The legislative history of the other two statutes, applicable to railroads (49 U.S.C. § 11503) and motor carriers (49 U.S.C. § 11503a), shows that these statutes, like § 1513(d), were expressly "designed to put an end to the widespread practice of treating for tax purposes the property of common and contract carriers on a different basis than other property. . .," including specifically "classifying carrier property in a separate class from all other taxable property."<sup>2</sup>

*Third*, appellees' principal argument appears to be that South Dakota's admittedly discriminatory airline

<sup>1</sup>"Motion \_\_\_\_," refers to appellees' Motion To Dismiss Or Affirm." "Juris. St. \_\_\_\_," refers to appellants' Jurisdictional Statement.

<sup>2</sup>S. Rep. No. 630, 91st Cong., 2d Sess. 2, 18 (1969).

flight property tax is permissible because § 1513, prohibiting discriminatory state taxation of interstate airlines, fails to contain the catchall language of the comparable statute for railroads, prohibiting "any other [state] tax which results in discriminatory treatment. . . ." 49 U.S.C. § 11503(b)(4). *See* Motion 6-7, 10-11. Appellees misunderstand that statute.

The catchall language of § 11503(b)(4) was not designed to prohibit some different kind of property tax discrimination; the drafters and supporters of the legislation believed that it already prohibited all forms of property tax discrimination even before the catchall provision was added to the bill. *See* Juris. St. 8-9 & nn. 9-11. The catchall provision instead was aimed at different taxes, such as a local gross receipts tax being imposed on the New York Dock Railway at a rate exceeding the rate applicable to other local public utilities.<sup>3</sup>

By contrast, § 1513(a) already prohibits any state tax whatsoever on an airline's gross receipts. *Aloha Airlines, supra*. The provisions of § 1513(d) therefore deal exclusively with state property taxes, and do not need a catchall provision like that of § 11503(b)(4) to prohibit a discriminatory gross receipts tax. The absence of such a catchall provision thus offers no rationale for interpreting § 1513(d) to permit discriminatory taxes on airline property.

*Finally*, appellees' reliance on *Ogilvie v. State Board of Equalization*, 492 F. Supp. 446 (D. N.D. 1980), *aff'd*, 657 F.2d 204 (8th Cir. 1981), *cert. denied*, 464

<sup>3</sup>*Railroads - 1975: Hearings Before the Subcomm. on Surface Transportation of the Senate Committee on Commerce*, 94th Cong., 1st Sess. 1883 (1975) (Testimony of Stuart H. Johnson).

U.S. 1086 (1981) (*see* Motion 7-11), emphasizes that the federal courts, as well as state courts, have experienced difficulty in applying the language used in three important federal statutes prohibiting state or local discriminatory taxation of interstate transportation property—49 U.S.C. §§ 1513(d) (airlines), § 11503 (railroads), and 11503a (motor carriers). A definitive decision by this Court would resolve those difficulties.

As appellees note (Motion 9), the district court in *Ogilvie*—like the South Dakota Supreme Court—concluded that business property exempt from taxation was not “subject to a property tax levy,” and thus was excluded from the definition, found in all three federal statutes, of “commercial and industrial property.” *Ogilvie v. State Board of Equalization*, *supra*, 492 F. Supp. at 453. The district court thus concluded that only the catchall prohibition of § 11503(b)(4) prohibited North Dakota from taxing railroad property while simultaneously exempting most other business and industrial property from all taxation. *Id.* at 454.

The district court in *Ogilvie*, like the South Dakota Supreme Court, failed to recognize that Congress used the words “subject to a property tax levy” for a specific purpose: to permit traditional tax distinctions among real, tangible personal and intangible property, and traditional tax exemptions for charitable or religious property. *See* Jurs. St. 10 & n. 14. Thus, the district court’s reasoning appears not to have been followed by the Eighth Circuit in affirming the *Ogilvie* decision,<sup>4</sup> and this reasoning was rejected by the

<sup>4</sup>The Eighth Circuit found that personal property of the railroads should be “exempt from taxation, the same as all other

North Dakota Supreme Court in a later case involving airlines, whose statute lacks the catchall prohibition. *Northwest Airlines, Inc. v. State Board of Equalization*, 358 N.W. 2d 515, 517 (N.D. 1984).

Other federal district courts also appear divided. One has followed the same reasoning as the *Ogilvie* district court to conclude that railroads cannot complain of discrimination if railroad personalty is taxed while inventories of other businesses are exempted from taxation.<sup>5</sup> But another has stated that “the ad valorem tax provisions of [§ 11503(a), (b) and (c)] make it plain that, for ad valorem tax purposes, the railroads are to be compared to *all other* commercial and industrial taxpayers. . . .” (emphasis added.)<sup>6</sup> And a third district court has applied § 11503a, which (like § 1513(d)) contains no catchall prohibition, to invalidate a Tennessee tax on motor carrier property because “other commercial and industrial property was presumed to have no value. . . .” *Arkansas-Best Freight System, Inc. v. Cochran*, 546 F. Supp. 915 (M.D. Tenn. 1982).

The present appeal focuses squarely and exclusively on the meaning of the phrase “subject to a property tax levy” as used in 49 U.S.C. §§ 1513(d), 11503, and 11503a. If this Court does not summarily reverse the

commercial and industrial property.” 657 F.2d at 210. *But see* *Trailer Train Co. v. State Board of Equalization*, 710 F.2d 468, 472 (8th Cir. 1983), in which the Eighth Circuit described its *Ogilvie* decision as resting on § 11503(b)(4). *See also* *Burlington North Railroad Company v. Bair*, 766 F.2d 1222 (8th Cir. 1985).

<sup>5</sup>*Atchison, Topeka & Sante Fe Railway Company v. State of Arizona*, 559 F. Supp. 1237 (D. Ariz. 1983).

<sup>6</sup>*Kansas City Southern Railway Company v. McNamara*, No. 83-72-A slip op. at 7 (M.D. La. Dec. 19, 1985).

judgment of the South Dakota Supreme Court, then it should note probable jurisdiction to resolve the conflicting interpretations by both federal and state courts of this statutory language.

Respectfully submitted,

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February, 1986